Mr. Scott Groene
Executive Director
Southern Utah Wilderness Alliance

Testimony
Before the Committee on Resources
United States House of Representatives

Oversight Field Hearing on Revised Statute 2477 And the April 2003 Memorandum of Understanding Between the State of Utah and the U.S. Department of Interior

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St. George, Utah

R. S. 2477
"The right-of-way for the construction of highways across public lands, not reserved for public uses, is hereby granted."
(1866)

Thank you for the opportunity to provide testimony on the important issue of the impact of Revised Statute 2477 ("R.S. 2477") on America's invaluable and increasingly popular public lands, especially Wilderness Areas, Wilderness Study Areas, National Parks, and proposed Wilderness Areas like those included in Utah's own wilderness bill, American's Redrock Wilderness Act, H.R. 1796 and S. 639. We are also pleased to present information to the committee regarding its particular area of interest today, the Memorandum of Understanding between the State of Utah and Secretary of Interior Gale Norton, signed on April 9, 2003, and its potential as a tool to resolving R.S. 2477 controversies.

As part or our overall mission to bring about the permanent protection of Utah's wild country under the Wilderness Act of 1964, the Southern Utah Wilderness Alliance has been actively involved in the R.S. 2477 issue for over a decade. Over the years we have thoroughly researched the case law and policy implications of the issue; provided testimony to this committee; worked with the Bureau of Land Management ("BLM") and others toward reasonable solutions to this problem; litigated where necessary; and conducted extensive public education efforts. We have also organized and implemented an extensive volunteer campaign to carefully document thousands of R.S. 2477 claims throughout the State of Utah, focusing primarily on claims which would intrude on lands proposed for wilderness designation. We draw on this long history of experience in this area to provide this information to the committee.

In short, overly-ambitious applications of R.S. 2477 have become a significant threat not only to the millions of acres of pristine landscapes throughout the West that qualify for preservation as Wilderness, but also to the ability of the federal land managers to manage all public lands for a variety of purposes under broader multiple use principles. These purposes include the protection of wildlife habitat, conservation of sensitive soils, water quality and the provision of primitive recreation opportunities in an increasingly urbanized world.

Moreover, special places that many Americans believe are already protected from development are also threatened by this old law. In Utah, for example, the state and county governments have made R.S. 2477 highway claims in many well-known National Parks like Canyonlands and Zion National Parks. As the Los Angeles Times recently reported, San Juan County, Utah, claims that Salt Creek, a peaceful riparian refuge and one of only three perennial sources of water in Canyonlands National Park, is actually a county highway under R.S. 2477. It recently filed a federal lawsuit in a bid to keep the National Park Service from protecting the stream from the pollution and other damage that jeep use had

caused this rare riparian environment. Julie Cart, "Utah County Looks at Nature and Sees a Way to Get There," Los Angeles Times (June 19, 2004) (attached for reference).

You may also be surprised to learn that the ambitious manner in which R.S. 2477 has been applied and promoted in Utah and elsewhere also threatens the ability of ranchers to undisturbed use of their grazing permits and the security of private property owners who discover the presence of undisclosed R.S. 2477 claims across their property. The possible consequences of R.S. 2477 could even impact the Department of Defense in its ability to secure lands under its control -- including lands within the Utah Test and Training Range where Tooele County and the State of Utah have made numerous R.S. 2477 claims totaling 1,908 miles of routes. A map of these routes, prepared by the Wild Utah Project in June 2004 and attached hereto, shows the R.S. 2477 claims within lands presumably under the sole control of the Department of Defense. (The location of the R.S. 2477 claims was confirmed by the State of Utah provided to the Department of Interior with its June 2000 Notice of Intent to Sue.)

Given that the State of Utah and a number of rural counties have asserted at least 10,000[1] and as many as 20,000[2] R.S. 2477 claims in national parks, wilderness areas, proposed wilderness areas, and other areas of concern, it is hard to imagine a more sweeping threat to these public treasures. Most of these claims are long-abandoned trails left by anonymous wanderers, dry stream bottoms, off-road vehicle routes, and some are not even visible on the ground. As a general rule, the R.S. 2477 claims at the center of this debate have not been constructed or maintained by the claimants, and until very recently, have not appeared on state or county highway maps.

The Interior Department's New Two-Pronged Approach: The Disclaimer of Interest Rule and the Memorandum of Understanding With the State of Utah

In 2003, the Interior Department developed two related mechanisms whose combined effect would be to ease the way for claimants to assert countless R.S. 2477 claims across federal public lands. As described more fully below, the two new tools are, first, an amended regulation which would allow the Interior Department to use a little-known provision of FLPMA known as the Disclaimer of Interior Rule to give away R.S. 2477 rights in circumstances not previously

[1] Testimony of Barbara Hjelle on behalf of the Utah Association of Counties presented before the House Subcommittee On National Parks, Forests and Lands (March 16, 1995)(the ten southern Utah counties possess roughly 9,900 2477 right-of-ways). Note: there are a total of 29 counties in Utah.

[2] Personal communication between Heidi McIntosh of SUWA and Ted Stephenson of the Utah State Office of the Bureau of Land Management, January 2003.

recognized. See 68 Fed. Reg. 494 (Jan. 6, 2003) (Final rule on Conveyances, Disclaimers and Corrections Documents).

The second tool is the April 9, 2003 Memorandum of Understanding with then Governor Michael Leavitt of the State of Utah. This agreement enables the State to submit R.S. 2477 claims under a relaxed standard of "use" (in contrast to the court's adoption of the actual construction requirement) for processing under the Disclaimer Rule. Under the MOU, the State would not submit claims in National Parks, Wilderness Areas, Wilderness Study Areas, or National Wildlife Refuges. The MOU does not, however, bind counties to its terms Nor does it foreclose the State's ability to go directly to court to seek R.S. 2477 rights, even in these four categories of land universally recognized as special places.

Proponents of the amended Disclaimer of Interest regulation and the Utah/Interior MOU argued that these two new tools, in combination, would provide an effective and needed alternative to costly litigation.

In this respect, however, the MOU has been both unnecessary and counter productive. Litigation regarding R.S. 2477 claims on federal land has been relatively uncommon, and does not pose a realistic threat to legitimate R.S. 2477 claims established through construction and which otherwise meet the legal requirements. (At any rate, litigation remains an option, even for the State, under the MOU – as the Utah Attorney General's office routinely points out.) Moreover, negotiation between reasonable parties was always a viable option, and available before the launch of the Interior Department's new approach.

Instead of alleviating the threat litigation and resolving legitimate claims, the Department's new approach opens the doors to borderline or outright illegitimate R.S. 2477 claims that would not otherwise satisfy legal standards recognized by the court. Ironically, this new approach raises more questions than it answers, and makes litigation more likely than ever. Indeed, on June 7, 2004, the State of Utah filed its opening brief in a 10th Circuit Court of Appeals arguing that tracks created by the passage of vehicles alone are enough to grant ownership of that “highway” to the State. And on May 12, 2004, the State of Utah filed another Notice of Intent to Sue with the Department of Interior which identified six R.S. 2477 claims it will seek to litigation.

Lastly, the State of Utah has spent between $8 million and $10 million since initiating its campaign to gain recognition for its thousands of R.S. 2477 claims. To date, it has filed a single application under the MOU – for the Weiss Highway in western Utah – a claim which the state indicates it will likely withdraw in light of the overwhelming evidence that the federal Civilian Conservation Corps actually built the route, not the County claimant. In view of the way the MOU has played out in Utah, it cannot reasonably be hailed as a successful effort to resolve the issue.

There are numerous reasons to be concerned about approaches that would fail to distinguish between valid and invalid claims to an R.S. 2477 right-of-way:

- The BLM manages the public lands according to resource management plans that are in effect for 15 years or more and are developed through lengthy study, balancing of uses and public participation. The overlay of thousands of unsubstantiated R.S. 2477 claims, heretofore unacknowledged, would undermine the management goals and assumptions that form the foundation for these plans.
- Once rights-of-way claims are validated, they are a permanent fixture on the public land. They cannot be changed to meet counterveiling public interest in other resources – wilderness or National Parks, for example, that are harmed by the new "highway."
- Granting rights-of-way across public lands is an open invitation to off-road vehicle enthusiasts, many of whom have bridled under the BLM's recent attempts to regulate their use of the public lands. ORVs leave water pollution, degraded riparian habitat, loss of wildlife and fragmented wildlife habitat, soil erosion and other impacts. Excessive R.S. 2477 claims would institutionalize these abusive uses just as the BLM is starting to assert its management responsibilities in this area.
- Counties can use R.S. 2477 to challenge decisions that would protect National Parks from the damage caused by jeeps and other four-wheel drive vehicles, as in the case of Salt Creek in Canyonlands.
- R.S. 2477 claims have been made specifically to disqualify lands from protection as designated wilderness areas.
- The impacts of recognizing one or thousands of R.S. 2477 claims would never be analyzed under the National Environmental Policy Act, accordingly, there would be no opportunity for public input.

Summary of Historical and Legal Background on R.S. 2477

While a full explication of the development of R.S. 2477 law is not possible here, a summary of the law and the circumstances of its enactment is necessary to a full understanding of the viability of the Memorandum of Understanding as a tool for resolving the R.S. 2477 issue.

Congress enacted R.S. 2477 shortly after the Civil War in 1866 as a way to encourage settlers to develop the wide-open western frontier. It provides, in its entirety, "the right of way for the construction of highways across public lands, not reserved for public uses, is hereby granted."[3] Like other statutes Congress

[3] 43 U.S.C. 932, (repealed, Federal Land Policy and Management Act, 43, U.S.C. Section 1701 et seq (1976)). Rights of way across federal public land are now

passed at about this time, such as the Mining Law of 1872, the Homestead Act, and the Desert Lands Act, it proposed a quid pro quo: those willing to exert labor and spend resources to develop the land, would be eligible for a reward in the form of a property interest in the land. It is nonsensical to assert that Congress intended to give away vast tracts of federal land in exchange for the haphazard wanderings of prospectors or other early western travelers who made no investment in lasting developments of the land.

Widely-recognized legal principles established early in the 20th century set the foundation for later R.S. 2477 case law that eventually took shape in the 1980s and 1990s. First, federal land grant statutes such as R.S. 2477 are uniformly construed "favorably to the government . . . [N]othing passes but what is conveyed in clear and explicit language – inferences being resolvednot against but for the government."[4] Further, the cardinal rule of statutory construction is to adhere to the statute's plain language, and that every word in a statute must be given meaningful, operative effect.[5] Thus, the words "construction" and "highway" in particular, as used in R.S. 2477, must be read first to require a purposeful act of construction, and secondly, a route or "high road" to public destinations.

In 1896, the Supreme Court decided *Bear Lake & River Waterworks and Irrigation Co. v. Garland*,[6]in which it interpreted R.S. 2477's original sister-provision – a section of the 1866 Mining Act which granted rights-of-way for the "construction" of canals. The Court held that no rights vested against the government under the "construction" requirement without the "performance of any labor."[7] "Until the completion of this work, or, in other words, until the *performance of the condition upon which the right . . . is based,* the person taking possession has no title, legal or equitable, as against the government."[8]

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granted under the authority of FLPMA Section 503, 43 U.S.C. Section 1763. Such grants are made with public participation and environmental review under the National Environmental Policy Act, 42 U.S.C. Section 4332 (1969). Further, "the Secretary concerned shall take into consideration national and State land use policies, environmental quality, economic efficiency, national security, safety and good engineering and technological practices" in deciding whether to issue rights of way. 43 U.S.C. 1763.

[4] *Caldwell v. United States*, 250 U.S. 14, 20 (1919); see also *Missouri, Kan. & Tex Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U.S. 491, 497 (1878).

[5] See *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (refusing to interpret a federal land grant in a manner rendering words superfluous).

[6] 164 U.S. 1 (1896).

[7] Id. at 18.

[8] Id. at 19 (emphasis added).

Given the principle of statutory construction that "when the same words are used in different sections of the law, they will be given the same meaning,"[9] the Supreme Court's decision in *Bear Lake* carries great weight in the interpretation of the "construction" requirement of R.S. 2477.

Nearly 75 years later, a number of cases began to frame the parameters of the R.S. 2477 elements. While many addressed issues that were peripheral to the key definitional questions,[10] the bottom line is that no federal case has ever held that a claimant may gain rights to federal public lands simply by the passage of vehicles alone – the characteristic that most of the controversial claims throughout the west hold in common.

We agree that many legitimate highways were constructed throughout the west, and should be recognized as valid R.S. 2477 highways. These highways, consistent with common practice at the time, were largely publicly funded and constructed by grading the surface of the land, raising a road bed, and applying a durable travel surface to allow the public to access identifiable destinations. [11]

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[9] *Harline v. Gladwell*, 950 F.2d 669, 674 (10th Cir. 1991).

[10] *See e.g. Central Pacific RR v. Alameda County*, 284 U.S. 463 (1932) (court found R.S. 2477 right-of-way where route first developed by passage of vehicles had later been constructed); *U.S. v. Vogler*, 859 F.2d 638 (9th Cir. 1988)(cert. denied 488 U.S. 1006 (1989)(Park Service had authority to regulate R.S. 2477 claim); *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988)(decision on scope of R.S. 2477 right-of-way); *U.S. v. Gates of the Mountains Lakeshore Homes*, 732 F.2d 1411 (9th Cir 1984)(state law could not authorize power lines to be placed in R.S. 2477 right-of-way).

[11] These terms were commonly used as such at about the time Congress enacted R.S. 2477. Noah Webster, *American Dictionary of the English Language* (1865) defined "construction" as "1. The act of construction; the act of building, or of devising and forming; fabrication; composition. 2. The manner of putting together the parts of anything so as to give the whole its peculiar form; structure; conformation."

Moreover, this definition is consistent with common highway construction practices at the time. An 1837 treatise by a leading authority on highway construction addressed drainage, materials, grading and laying a foundation. Surfaces consisted of wooden planks, broken stones or beaten earth. Frederick W. Simms, *A Treatise on the Principles and Practices of Levelling, Showings its Application to Purposes of Civil Engineering Particularly in the Construction of Roads 102-107 (1837).*

Similarly, Utah highway construction practices in the mid-19th century involved detailed surveys and plans, and the building of bridges, aqueducts, culverts, turnpikes and other fixtures. Ezra C. Knowlton, *History of Highway Development in Utah* 11-12 (Utah State Department of Highways 1964); Edward A. Geary, *A History of Emery County* 117, 218 (Utah State Historical Society and

These routes are not the subject of controversy.

The Heart of the Controversy – Jeep Ruts and Stream Beds

In contrast to the cases in which there was a concerted effort to construct a highway, the heart of the R.S. 2477 controversy involves the question of whether every track ever used by early settlers, prospectors, ranchers and others gives rise to a county "highway." If so, the footprints of past generations would stymie forever the application of sound land management, including the preservation of national parks and other pristine areas for the benefit of future generations.

Ironically, because these controversial routes have not been maintained by federal, state or county agencies, they do not even function as dependably safe, public highways. For example, the R.S. 2477 claims asserted by San Juan County in a case now before the 10th Circuit Court of Appeals, had never been constructed or maintained by the County prior to the grading which spurred the litigation. In that case, *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 147 F. Supp. 2nd (D. Utah 2001) (10th Circuit appeal pending, Appeal No. 04-4073), it became apparent that the three defendant counties by and large had no information regarding the person responsible for the tracks claimed as “highways,” the purpose of the routes, their destination, or the authority under which any of the "work" had been done. Simply put, the counties had nothing to do with the creation of these routes, yet maintain that they are still county “highways.”

The MOU Ignores Legal Precedent and the Historical Context of R.S. 2477 .

In a deviation from existing legal precedent, the standards which the MOU applies to deciding whether a road is valid focus on *use* instead of construction– an approach specifically rejected by the U.S. District Court for the District of Utah. Instead, the court focused on the word used in the law – “construction:” “Congress in 1866 desired that RS 2477 rights-of-way be intentionally, physically worked on to produce a surface conducive to public traffic” --a test that the Interior Department had itself relied on for decades. The court also specifically ruled that a standard based on “use” “sets a lower standard for the establishment of rights-of-way over federal lands than the one intended by Congress.” The court also upheld the BLM’s own interpretation of “highway” as one which “connects the public with identifiable destinations or places”. The MOU does not address this aspect of the standard.

In a subsequent blow to the MOU, the U.S. General Accounting Office (GAO) issued an opinion on February 6, 2004 which concluded that the MOU, among

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Emery County Commission 1996) (early highway construction methods included drainage, culverts and steel truss bridges, accomplished with public funding).

other things, violates a congressional prohibition on the implementation of new rules or regulations pertaining to R.S. 2477. More specifically, the GAO concluded that one of the key flaws of the MOU was its creation of new – and substantially weakened – standards for the evaluation of the validity of R.S. 2477 claims, citing the establishment of "use" instead of construction in contravention of the opinion in *SUWA v. BLM*, described above.

Other loopholes plague the document. It does not waive any alleged rights to assert that the hiking trails the State already claimed in every National Park, are actually roads. Nor does it bar or impede litigation by either the State or Counties to establish R.S. 2477 claims – even for those claims for which an application has been submitted under the MOU.

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The MOU has always had a hostile reception and limited acceptance. On January 12, 2004 – two days before Governor Walker submitted Utah's first application under the MOU, the Attorney General's Office characterized the MOU in a letter to conservationists as a political gesture by Governor Leavitt, who was about to leave office. The letter made it clear that the Attorney General was prepared to initiate litigation regardless of the MOU. (The letter from Ralph Finlayson of the Utah Attorney General's Office to Edward Zukoski of Earthjustice, is attached hereto for reference.)

In May 2004, the Attorney General's office also explained in a brief it submitted in defense of its refusal to release documents[12] that it has "no present intention" of filing more claims under the MOU. Then, on May 12, 2003, it filed yet another Notice of Intent to Sue with the Interior Department specifying additional routes it says it will pursue in court against the federal government.

Other unresolved issues undercut public confidence in both the process and the legality of its outcome. For example, the public does not have answers to fundamental questions relating to:

- The legal standards the BLM will employ to assess the validity of an R.S. 2477 claim (the Interior Department and BLM have refused to answer this key question);
- The type of investigation the BLM conduct prior to recognizing a claim;
- The role of citizens who claim no specific property interest in the land affected by an R.S. 2477 claim but have a strong interest in the affected public lands;
- The circumstances under which BLM may waive the requirement that the applicant submit documentation of its claim;

[12] On May 20, the State Records Committee ruled in favor of the Southern Utah Wilderness Alliance and The Wilderness Society, and ordered the Utah Attorney General to disclose documents on the 20 routes the State is currently claiming as "highways" under R.S. 2477. *Salt Lake Tribune, May 21, 2004*

- The mechanism, if any, by which the public may appeal decisions to grant a disclaimer and whether the decision is "stayed" during the appeal period;
- The availability of BLM budget and staff to address disclaimers and whether resources will be diverted from other critical functions to address what may ultimately be a high volume of R.S. 2477 applications.

All of these unresolved questions are raised by the Disclaimer Rule and the MOU.

Finally, there appears to be little public patience for R.S. 2477 claimants taking the law into their own hands, acting outside the bounds of applicable court decisions. As the Salt Lake Tribune recently editorialized "[Judge] Campbell's ruling sets a proper standard for future RS 2477 road claims under the Leavitt-Norton agreement Counties should pay heed to its warming that lawlessness won't be tolerated in this road war." (Attached hereto for reference.) Clearly, it is time for a new approach that is grounded in the law and in common sense, one which provides access to our public lands, but does not harm them in the process.

Better Alternatives to the MOU Exists

The Administration's current approach is fundamentally flawed and legally questionable. So far it has produced only a single faulty claim (one which the State recently indicated it would drop) and has failed to alleviate the threat of litigation.

There is a better option than proceeding with the current approach. While many R.S. 2477 claims are unfounded, there are some routes that are valid "highways" established under the original authority of RS 2477. Because of the controversy surrounding this issue, it is vital for Congress to establish a clear process that will recognize valid claims and deny those that are invalid.

Congress can resolve this issue by passing the R.S. 2477 Rights of Way Act, H.R. 1639, sponsored by Rep. Mark Udall. This legislation establishes sound, common-sense criteria for determining the validity of RS 2477 claims, allows the federal government to honor those that are valid and legitimate, and protects our public lands from those that are fraudulent.

H.R.1639:

- Recognizes existing objective criteria for determining the validity of a highway claim, including: 1) construction and continuous use of the route by the public "for the passage of four-wheeled highway vehicles carrying people or goods from one inhabited place to another;" 2) routine maintenance of the route by the responsible government entity; and 3) and proof of the route's existence before RS 2477 was repealed in 1976.

- Assures that strict standards are applied to protect private property, which could be adversely affected by RS 2477 claims under the new disclaimer rule.

- Assures that strict standards are applied to claims in National Parks, National Wildlife Refuges, National Wild and Scenic Rivers, National Trails, Wilderness Areas, Wilderness Study Areas, National Monuments, National Forest roadless areas, and the National Landscape Conservation System.

- Requires public involvement.

Further, as discussed above, FLPMA Title V already provides a mechanism by which the Department of Interior has already issued thousands of rights-of-way across public lands, and unlike what would be the case in R.S. 2477 claims, did so in a way which largely took into account the best means for provided public access and minimizing environmental impacts – and in a way that was open to the public.

CONCLUSION

Unknown R.S. 2477 claims are dormant threats lying across our nation's National Parks, proposed Wilderness lands, wildlife habitat and along our rare riparian areas. These R.S. 2477 claims should be openly evaluated and resolved so public lands can be protected and managed by the federal agencies in charge. Both H.R. 1639 and existing FLPMA provisions are better alternatives to the Utah/Interior Department Memorandum of Agreement and/or the use of the new Disclaimer Rule.